IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2496 OF 2005

Mr.R.Gunasekharan ..Petitioner

Vs.

M/s.Mahalaxmi Vastra Sanchar
& Anr. ..Respondents

...

Mr.K.M.Sanghani i/b M/s. Saxena and Co.
for Petitioner
Mr.Harihar Bhave for Respondent no.1
Mr.B.H.Mehta A.P.P. for State

...

CORAM: SMT.V.K.TAHILRAMANI,J.

DATE : OCTOBER 14, 2005

P.C.

1. Heard the learned advocate for the petitioner-accused, learned advocate for the respondent no.1-complainant and the learned A.P.P. for the State.

2. The petitioner is seeking quashing of proceedings relating to Criminal Case

No.224/SS/2005 which is pending before the learned Metropolitan Magistrate, 21st Court, Bandra Mumbai. The said case is under Section 138 r.w. 141 of Negotiable Instruments Act. In the said case, the learned Magistrate has issued process against the petitioner under Section 138 of Negotiable Instruments Act. The petitioner had preferred an application for recalling of process before the learned Magistrate. Being aggrieved by the said order, the petitioner filed revision before the Sessions Court challenging the order of issuance of process. The said revision came to be dismissed by the learned Sessions Judge by order dated 12.9.2005. Being aggrieved by the said order, this petition has been preferred.

3. The learned advocate for the petitioner has submitted that there was no legal liability which is clear from the MOU which is annexed to the present petition at Exh.F. On perusal of the MOU and the complaint filed in the present case, it is seen that the cheques which are reflected in the MOU are different from those in respect of which the complaint was filed. Thus, prima facie, there

does not appear merit in the submission made by the learned advocate for the petitioner. Moreover, it is seen that reliance is placed on the MOU in support of the contention that the petitioner was under no legal liability. In the case of **State of MP Vs. Awadh Kishore Gupta & Ors.** reported in **(2004) 1 SCC 691,** the Supreme Court has observed that the annexures to the petition cannot be termed as evidence without being tested and proved and hence, these annexures should not be acted upon by the High Court. So also, in the case of **Chand Dhawan Vs. Jawaharlal & Ors.** reported in **(1992) 3 SCC 317,** it has been held by the Supreme Court that the Court should not act on the annexures to the petition under Section 482 of Cr.P.C. where the documents are not admitted or accepted by the complainant. In view of the observations of the Supreme Court in various decisions cited above, I am of the opinion that no reliance can be placed on the MOU at this stage.

4. Moreover, once ingredients of Section 138 of Negotiable Instruments Act are fulfilled, a presumption would arise in favour of the holder of

the cheque in view of Section 138 of Negotiable Instruments Act and as per the provisions of Section 139 it shall be presumed that unless the contrary is proved that the holder of a cheque received the cheque for the discharge of any debt or other liability. Thus, it is seen that presumption arises in favour of the holder of the cheque and the accused is called upon to discharge the burden and this can only be done by leading appropriate evidence before the trial Court.

5. Moreover, in the case of **A.V.Murty Vs. P.S.Nagabasavanna; 2002 Cri.L.J. 1479,** the Supreme Court has observed that dismissal of the complaint on the ground that the cheque drawn was in respect of debt or liability which was not legally enforceable, is illegal and erroneous at the initial stage of enquiry. The Supreme Court has further observed that such a question is a mixed question of law and fact and hence, trial is necessary.

6. Mr.Sanghani has further submitted that as there is contract between the parties i.e. the

petitioner and the complainant hence, at the most it can be said that there is breach of contractual obligation for which the remedy to the complainant would be to file a suit for breach of contract and the complainant could not have filed a criminal complaint. I find no merit in this submission because if the facts of the case make out a criminal offence, it would always be open to the complainant to adopt criminal proceedings.

7. Mr.Sanghani has placed reliance on another decision of the Supreme Court in the case of **Shanti Prasad Jain Vs. The Director of Enforcement Foreign Exchange Regulation Act (FERA)** reported in **AIR 1962 SC 1764.** He has placed reliance on the observation in the said case that contingent debt is not a debt till the contingency happens. However, the said decision would not be applicable to the facts of the present case as on perusal of the averments in the complaint, it is seen that offence under Section 138 of Negotiable Instruments Act is prima facie made out against the petitioner.

8. It is pertinent to note that in the present case, the complainant and the witnesses have been examined and the statement of the accused under Section 313 of Cr.P.C. has also been recorded and now the matter is kept for arguments. Looking to these facts, I am of the opinion that the petitioner is only adopting dilatory tactics in order to delay the trial. I find no merit in this petition. Petition is rejected.

[V.K.TAHILRAMANI,J.]